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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
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11  
12 Plaintiff,  
13 v.  
14  
15 Defendant.

Case No. C

STIPULATED PROTECTIVE ORDER  
FOR LITIGATION INVOLVING  
PATENTS, HIGHLY SENSITIVE  
CONFIDENTIAL INFORMATION  
AND/OR TRADE SECRETS

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18 1. PURPOSES AND LIMITATIONS

19 Disclosure and discovery activity in this action are likely to involve production of  
20 confidential, proprietary, or private information for which special protection from public  
21 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.  
22 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated  
23 Protective Order. The parties acknowledge that this Order does not confer blanket protections on  
24 all disclosures or responses to discovery and that the protection it affords from public disclosure  
25 and use extends only to the limited information or items that are entitled to confidential treatment  
26 under the applicable legal principles. The parties further acknowledge, as set forth in Section  
27 14.4, below, that this Stipulated Protective Order does not entitle them to file confidential  
28 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and

1 the standards that will be applied when a party seeks permission from the court to file material  
2 under seal.

3 2. DEFINITIONS

4 2.1 Challenging Party: a Party or Non-Party that challenges the designation of  
5 information or items under this Order.

6 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how  
7 it is generated, stored or maintained) or tangible things that qualify for protection under Federal  
8 Rule of Civil Procedure 26(c).

9 2.3 Counsel (without qualifier): Outside Counsel of Record and House  
10 Counsel (as well as their support staff).

11 [2.4 Optional: Designated House Counsel: House Counsel who seek access to  
12 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.]

13 2.5 Designating Party: a Party or Non-Party that designates information or  
14 items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL” or  
15 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [*Optional*: or “HIGHLY  
16 CONFIDENTIAL – SOURCE CODE”].

17 2.6 Disclosure or Discovery Material: all items or information, regardless of  
18 the medium or manner in which it is generated, stored, or maintained (including, among other  
19 things, testimony, transcripts, and tangible things), that are produced or generated in disclosures  
20 or responses to discovery in this matter.

21 2.7 Expert: a person with specialized knowledge or experience in a matter  
22 pertinent to the litigation who (1) has been retained by a Party or its counsel to serve as an expert  
23 witness or as a consultant in this action, (2) is not a past or current employee of a Party or of a  
24 Party’s competitor, and (3) at the time of retention, is not anticipated to become an employee of a  
25 Party or of a Party’s competitor.

26 2.8 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”  
27 Information or Items: extremely sensitive “Confidential Information or Items,” disclosure of  
28 which to another Party or Non-Party would create a substantial risk of serious harm that could not

1 be avoided by less restrictive means.

2 [2.9 *Optional*: “HIGHLY CONFIDENTIAL – SOURCE CODE” Information  
3 or Items: extremely sensitive “Confidential Information or Items” representing computer code  
4 and associated comments and revision histories, formulas, engineering specifications, or  
5 schematics that define or otherwise describe in detail the algorithms or structure of software or  
6 hardware designs, disclosure of which to another Party or Non-Party would create a substantial  
7 risk of serious harm that could not be avoided by less restrictive means.]

8 2.10 House Counsel: attorneys who are employees of a party to this action.  
9 House Counsel does not include Outside Counsel of Record or any other outside counsel.

10 2.11 Non-Party: any natural person, partnership, corporation, association, or  
11 other legal entity not named as a Party to this action.

12 2.12 Outside Counsel of Record: attorneys who are not employees of a party to  
13 this action but are retained to represent or advise a party to this action and have appeared in this  
14 action on behalf of that party or are affiliated with a law firm which has appeared on behalf of  
15 that party.

16 2.13 Party: any party to this action, including all of its officers, directors,  
17 employees, consultants, retained experts, and Outside Counsel of Record (and their support  
18 staffs).

19 2.14 Producing Party: a Party or Non-Party that produces Disclosure or  
20 Discovery Material in this action.

21 2.15 Professional Vendors: persons or entities that provide litigation support  
22 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
23 organizing, storing, or retrieving data in any form or medium) and their employees and  
24 subcontractors.

25 2.16 Protected Material: any Disclosure or Discovery Material that is  
26 designated as “CONFIDENTIAL,” or as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES  
27 ONLY.” [*Optional*: or as “HIGHLY CONFIDENTIAL – SOURCE CODE.”]

28 2.17 Receiving Party: a Party that receives Disclosure or Discovery Material

1 from a Producing Party.

2 3. SCOPE

3 The protections conferred by this Stipulation and Order cover not only Protected  
4 Material (as defined above), but also (1) any information copied or extracted from Protected  
5 Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any  
6 testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected  
7 Material. However, the protections conferred by this Stipulation and Order do not cover the  
8 following information: (a) any information that is in the public domain at the time of disclosure  
9 to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party  
10 as a result of publication not involving a violation of this Order, including becoming part of the  
11 public record through trial or otherwise; and (b) any information known to the Receiving Party  
12 prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who  
13 obtained the information lawfully and under no obligation of confidentiality to the Designating  
14 Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

15 4. DURATION

16 Even after final disposition of this litigation, the confidentiality obligations  
17 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing  
18 or a court order otherwise directs. Final disposition shall be deemed to be the later of (1)  
19 dismissal of all claims and defenses in this action, with or without prejudice; and (2) final  
20 judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or  
21 reviews of this action, including the time limits for filing any motions or applications for  
22 extension of time pursuant to applicable law.

23 5. DESIGNATING PROTECTED MATERIAL

24 5.1 Exercise of Restraint and Care in Designating Material for Protection.

25 Each Party or Non-Party that designates information or items for protection under this Order must  
26 take care to limit any such designation to specific material that qualifies under the appropriate  
27 standards. To the extent it is practical to do so, the Designating Party must designate for  
28 protection only those parts of material, documents, items, or oral or written communications that

1 qualify – so that other portions of the material, documents, items, or communications for which  
2 protection is not warranted are not swept unjustifiably within the ambit of this Order.

3 Mass, indiscriminate, or routinized designations are prohibited. Designations that  
4 are shown to be clearly unjustified or that have been made for an improper purpose (e.g., to  
5 unnecessarily encumber or retard the case development process or to impose unnecessary  
6 expenses and burdens on other parties) expose the Designating Party to sanctions.

7 If it comes to a Designating Party's attention that information or items that it  
8 designated for protection do not qualify for protection at all or do not qualify for the level of  
9 protection initially asserted, that Designating Party must promptly notify all other parties that it is  
10 withdrawing the mistaken designation.

11 5.2 Manner and Timing of Designations. Except as otherwise provided in this  
12 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
13 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
14 designated before the material is disclosed or produced.

15 Designation in conformity with this Order requires:

16 (a) for information in documentary form (e.g., paper or electronic documents, but  
17 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing  
18 Party affix the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS'  
19 EYES ONLY" [*Optional*: or "HIGHLY CONFIDENTIAL – SOURCE CODE"] to each page  
20 that contains protected material. If only a portion or portions of the material on a page qualifies  
21 for protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by  
22 making appropriate markings in the margins) and must specify, for each portion, the level of  
23 protection being asserted.

24 A Party or Non-Party that makes original documents or materials available for  
25 inspection need not designate them for protection until after the inspecting Party has indicated  
26 which material it would like copied and produced. During the inspection and before the  
27 designation, all of the material made available for inspection shall be deemed "HIGHLY  
28 CONFIDENTIAL – ATTORNEYS' EYES ONLY." After the inspecting Party has identified the

1 documents it wants copied and produced, the Producing Party must determine which documents,  
2 or portions thereof, qualify for protection under this Order. Then, before producing the specified  
3 documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL” or  
4 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [*Optional:* or “HIGHLY  
5 CONFIDENTIAL – SOURCE CODE”]) to each page that contains Protected Material. If only a  
6 portion or portions of the material on a page qualifies for protection, the Producing Party also  
7 must clearly identify the protected portion(s) (e.g., by making appropriate markings in the  
8 margins) and must specify, for each portion, the level of protection being asserted.

9 (b) for testimony given in deposition or in other pretrial or trial proceedings, that  
10 the Designating Party identify on the record, before the close of the deposition, hearing, or other  
11 proceeding, all protected testimony and specify the level of protection being asserted. When it is  
12 impractical to identify separately each portion of testimony that is entitled to protection and it  
13 appears that substantial portions of the testimony may qualify for protection, the Designating  
14 Party may invoke on the record (before the deposition, hearing, or other proceeding is concluded)  
15 a right to have up to 21 days to identify the specific portions of the testimony as to which  
16 protection is sought and to specify the level of protection being asserted. Only those portions of  
17 the testimony that are appropriately designated for protection within the 21 days shall be covered  
18 by the provisions of this Stipulated Protective Order. Alternatively, a Designating Party may  
19 specify, at the deposition or up to 21 days afterwards if that period is properly invoked, that the  
20 entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –  
21 ATTORNEYS’ EYES ONLY.”

22 Parties shall give the other parties notice if they reasonably expect a deposition,  
23 hearing or other proceeding to include Protected Material so that the other parties can ensure that  
24 only authorized individuals who have signed the “Acknowledgment and Agreement to Be  
25 Bound” (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a  
26 deposition shall not in any way affect its designation as “CONFIDENTIAL” or “HIGHLY  
27 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

28 Transcripts containing Protected Material shall have an obvious legend on the title

1 page that the transcript contains Protected Material, and the title page shall be followed by a list  
 2 of all pages (including line numbers as appropriate) that have been designated as Protected  
 3 Material and the level of protection being asserted by the Designating Party. The Designating  
 4 Party shall inform the court reporter of these requirements. Any transcript that is prepared before  
 5 the expiration of a 21-day period for designation shall be treated during that period as if it had  
 6 been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety  
 7 unless otherwise agreed. After the expiration of that period, the transcript shall be treated only as  
 8 actually designated.

9 (c) for information produced in some form other than documentary and for any  
 10 other tangible items, that the Producing Party affix in a prominent place on the exterior of the  
 11 container or containers in which the information or item is stored the legend “CONFIDENTIAL”  
 12 or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [*Optional:* or “HIGHLY  
 13 CONFIDENTIAL – SOURCE CODE”]. If only a portion or portions of the information or item  
 14 warrant protection, the Producing Party, to the extent practicable, shall identify the protected  
 15 portion(s) and specify the level of protection being asserted.

16 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent  
 17 failure to designate qualified information or items does not, standing alone, waive the Designating  
 18 Party’s right to secure protection under this Order for such material. Upon timely correction of a  
 19 designation, the Receiving Party must make reasonable efforts to assure that the material is  
 20 treated in accordance with the provisions of this Order.

## 21 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

22 6.1 Timing of Challenges. Any Party or Non-Party may challenge a  
 23 designation of confidentiality at any time. Unless a prompt challenge to a Designating Party’s  
 24 confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary  
 25 economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its  
 26 right to challenge a confidentiality designation by electing not to mount a challenge promptly  
 27 after the original designation is disclosed.

28 6.2 Meet and Confer. The Challenging Party shall initiate the dispute

1 resolution process by providing written notice of each designation it is challenging and describing  
2 the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the  
3 written notice must recite that the challenge to confidentiality is being made in accordance with  
4 this specific paragraph of the Protective Order. The parties shall attempt to resolve each  
5 challenge in good faith and must begin the process by conferring directly (in voice to voice  
6 dialogue; other forms of communication are not sufficient) within 14 days of the date of service  
7 of notice. In conferring, the Challenging Party must explain the basis for its belief that the  
8 confidentiality designation was not proper and must give the Designating Party an opportunity to  
9 review the designated material, to reconsider the circumstances, and, if no change in designation  
10 is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to  
11 the next stage of the challenge process only if it has engaged in this meet and confer process first  
12 or establishes that the Designating Party is unwilling to participate in the meet and confer process  
13 in a timely manner.

14           6.3     Judicial Intervention. If the Parties cannot resolve a challenge without  
15 court intervention, the Designating Party shall file and serve a motion to retain confidentiality  
16 under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21  
17 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and  
18 confer process will not resolve their dispute, whichever is earlier.<sup>1</sup> Each such motion must be  
19 accompanied by a competent declaration affirming that the movant has complied with the meet  
20 and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to  
21 make such a motion including the required declaration within 21 days (or 14 days, if applicable)  
22 shall automatically waive the confidentiality designation for each challenged designation. In  
23 addition, the Challenging Party may file a motion challenging a confidentiality designation at any  
24 time if there is good cause for doing so, including a challenge to the designation of a deposition  
25 transcript or any portions thereof. Any motion brought pursuant to this provision must be  
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27 <sup>1</sup> *Alternative*: It may be appropriate in certain circumstances for the parties to agree to shift the  
28 burden to move on the Challenging Party after a certain number of challenges are made to avoid  
an abuse of the process. The burden of persuasion would remain on the Designating Party.



1 accompanied by a competent declaration affirming that the movant has complied with the meet  
2 and confer requirements imposed by the preceding paragraph.

3 The burden of persuasion in any such challenge proceeding shall be on the  
4 Designating Party. Frivolous challenges and those made for an improper purpose (e.g., to harass  
5 or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party  
6 to sanctions. Unless the Designating Party has waived the confidentiality designation by failing  
7 to file a motion to retain confidentiality as described above, all parties shall continue to afford the  
8 material in question the level of protection to which it is entitled under the Producing Party's  
9 designation until the court rules on the challenge.

## 10 7. ACCESS TO AND USE OF PROTECTED MATERIAL

11 7.1 Basic Principles. A Receiving Party may use Protected Material that is  
12 disclosed or produced by another Party or by a Non-Party in connection with this case only for  
13 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be  
14 disclosed only to the categories of persons and under the conditions described in this Order.  
15 When the litigation has been terminated, a Receiving Party must comply with the provisions of  
16 section 15 below (FINAL DISPOSITION).

17 Protected Material must be stored and maintained by a Receiving Party at a  
18 location and in a secure manner<sup>2</sup> that ensures that access is limited to the persons authorized  
19 under this Order.

20 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise  
21 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may  
22 disclose any information or item designated "CONFIDENTIAL" only to:

23 (a) the Receiving Party's Outside Counsel of Record in this action, as well as  
24 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
25 information for this litigation and who have signed the "Acknowledgment and Agreement to Be  
26 Bound" that is attached hereto as Exhibit A;

27  
28 <sup>2</sup> It may be appropriate under certain circumstances to require the Receiving Party to store any  
electronic Protected Material in password-protected form.

1 (b) the officers, directors, and employees (including House Counsel) of the  
2 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have  
3 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

4 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is  
5 reasonably necessary for this litigation and who have signed the “Acknowledgment and  
6 Agreement to Be Bound” (Exhibit A);

7 (d) the court and its personnel;

8 (e) court reporters and their staff, professional jury or trial consultants, and  
9 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have  
10 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

11 (f) during their depositions, witnesses in the action to whom disclosure is  
12 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”  
13 (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of  
14 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be  
15 separately bound by the court reporter and may not be disclosed to anyone except as permitted  
16 under this Stipulated Protective Order.

17 (g) the author or recipient of a document containing the information or a custodian  
18 or other person who otherwise possessed or knew the information.

19 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES  
20 ONLY” [*Optional*: and “HIGHLY CONFIDENTIAL – SOURCE CODE”] Information or Items.

21 Unless otherwise ordered by the court or permitted in writing by the Designating Party, a  
22 Receiving Party may disclose any information or item designated “HIGHLY CONFIDENTIAL –  
23 ATTORNEYS’ EYES ONLY” [*Optional*: or “HIGHLY CONFIDENTIAL – SOURCE CODE”]  
24 only to:

25 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as  
26 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
27 information for this litigation and who have signed the “Acknowledgment and Agreement to Be  
28 Bound” that is attached hereto as Exhibit A;

1 [(b) *Optional as deemed appropriate in case-specific circumstances:* Designated  
 2 House Counsel of the Receiving Party<sup>3</sup> (1) who has no involvement in competitive decision-  
 3 making, (2) to whom disclosure is reasonably necessary for this litigation, (3) who has signed the  
 4 “Acknowledgment and Agreement to Be Bound” (Exhibit A), and (4) as to whom the procedures  
 5 set forth in paragraph 7.4(a)(1), below, have been followed];<sup>4</sup>

6 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary  
 7 for this litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound”  
 8 (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been  
 9 followed];

10 (d) the court and its personnel;

11 (e) court reporters and their staff, professional jury or trial consultants,<sup>5</sup> and  
 12 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have  
 13 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A); and

14 (f) the author or recipient of a document containing the information or a custodian  
 15 or other person who otherwise possessed or knew the information.

16 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY  
 17 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [*Optional:* or “HIGHLY CONFIDENTIAL  
 18 – SOURCE CODE”] Information or Items to Designated House Counsel<sup>6</sup> or Experts.<sup>7</sup>

19 \_\_\_\_\_  
 20 <sup>3</sup> It may be appropriate under certain circumstances to limit the number of Designated House  
 21 Counsel who may access “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”  
 22 information under this provision.

23 <sup>4</sup> This Order contemplates that Designated House Counsel shall not have access to any  
 24 information or items designated “HIGHLY CONFIDENTIAL – SOURCE CODE.” It may also  
 25 be appropriate under certain circumstances to limit how Designated House Counsel may access  
 26 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information. For example,  
 27 Designated House Counsel may be limited to viewing “HIGHLY CONFIDENTIAL –  
 28 ATTORNEYS’ EYES ONLY” information only if it is filed with the court under seal, or in the  
 presence of Outside Counsel of Record at their offices.

<sup>5</sup> *Alternative:* The parties may wish to allow disclosure of information not only to professional  
 jury or trial consultants, but also to mock jurors, to further trial preparation. In that situation, the  
 parties may wish to draft a simplified, precisely tailored Undertaking for mock jurors to sign.

<sup>6</sup> *Alternative:* The parties may exchange names of a certain number of Designated House Counsel  
 instead of following this procedure.

<sup>7</sup> *Alternative:* “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES  
 ONLY” information or items may be disclosed to an Expert without disclosure of the identity of

(a)(1) Unless otherwise ordered by the court or agreed to in writing by the Designating Party, a Party that seeks to disclose to Designated House Counsel any information or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to paragraph 7.3(b) first must make a written request to the Designating Party that (1) sets forth the full name of the Designated House Counsel and the city and state of his or her residence, and (2) describes the Designated House Counsel’s current and reasonably foreseeable future primary job duties and responsibilities in sufficient detail to determine if House Counsel is involved, or may become involved, in any competitive decision-making.<sup>8</sup>

(a)(2) Unless otherwise ordered by the court or agreed to in writing by the Designating Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [*Optional:* or “HIGHLY CONFIDENTIAL – SOURCE CODE”] pursuant to paragraph 7.3(c) first must make a written request to the Designating Party that (1) identifies the general categories of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [*Optional:* or “HIGHLY CONFIDENTIAL – SOURCE CODE”] information that the Receiving Party seeks permission to disclose to the Expert, (2) sets forth the full name of the Expert and the city and state of his or her primary residence, (3) attaches a copy of the Expert’s current resume, (4) identifies the Expert’s current employer(s), (5) identifies each person or entity from whom the Expert has received compensation or funding for work in his or her areas of expertise or to whom the expert has provided professional services, including in connection with a litigation, at any time during the preceding five years,<sup>9</sup> and (6) identifies (by name and number of the case, filing

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the Expert as long as the Expert is not a current officer, director, or employee of a competitor of a Party or anticipated to become one.

<sup>8</sup> It may be appropriate in certain circumstances to require any Designated House Counsel who receives “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information pursuant to this Order to disclose any relevant changes in job duties or responsibilities prior to final disposition of the litigation to allow the Designating Party to evaluate any later-arising competitive decision-making responsibilities.

<sup>9</sup> If the Expert believes any of this information is subject to a confidentiality obligation to a third-party, then the Expert should provide whatever information the Expert believes can be disclosed without violating any confidentiality agreements, and the Party seeking to disclose to the Expert shall be available to meet and confer with the Designating Party regarding any such engagement.

1 date, and location of court) any litigation in connection with which the Expert has offered expert  
2 testimony, including through a declaration, report, or testimony at a deposition or trial, during the  
3 preceding five years.<sup>10</sup>

4 (b) A Party that makes a request and provides the information specified in the  
5 preceding respective paragraphs may disclose the subject Protected Material to the identified  
6 Designated House Counsel or Expert unless, within 14 days of delivering the request, the Party  
7 receives a written objection from the Designating Party. Any such objection must set forth in  
8 detail the grounds on which it is based.

9 (c) A Party that receives a timely written objection must meet and confer with the  
10 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by  
11 agreement within seven days of the written objection. If no agreement is reached, the Party  
12 seeking to make the disclosure to Designated House Counsel or the Expert may file a motion as  
13 provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable)  
14 seeking permission from the court to do so. Any such motion must describe the circumstances  
15 with specificity, set forth in detail the reasons why the disclosure to Designated House Counsel or  
16 the Expert is reasonably necessary, assess the risk of harm that the disclosure would entail, and  
17 suggest any additional means that could be used to reduce that risk. In addition, any such motion  
18 must be accompanied by a competent declaration describing the parties' efforts to resolve the  
19 matter by agreement (i.e., the extent and the content of the meet and confer discussions) and  
20 setting forth the reasons advanced by the Designating Party for its refusal to approve the  
21 disclosure.

22 In any such proceeding, the Party opposing disclosure to Designated House  
23 Counsel or the Expert shall bear the burden of proving that the risk of harm that the disclosure  
24 would entail (under the safeguards proposed) outweighs the Receiving Party's need to disclose  
25 the Protected Material to its Designated House Counsel or Expert.

26  
27 <sup>10</sup> It may be appropriate in certain circumstances to restrict the Expert from undertaking certain  
28 limited work prior to the termination of the litigation that could foreseeably result in an improper  
use of the Designating Party's "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"  
information.

1           8.       PROSECUTION BAR [Optional]

2           Absent written consent from the Producing Party, any individual who receives  
 3 access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [Optional: or  
 4 “HIGHLY CONFIDENTIAL – SOURCE CODE”] information shall not be involved in the  
 5 prosecution of patents or patent applications relating to [insert subject matter of the invention and  
 6 of highly confidential technical information to be produced], including without limitation the  
 7 patents asserted in this action and any patent or application claiming priority to or otherwise  
 8 related to the patents asserted in this action, before any foreign or domestic agency, including the  
 9 United States Patent and Trademark Office (“the Patent Office”).<sup>11</sup> For purposes of this  
 10 paragraph, “prosecution” includes directly or indirectly drafting, amending, advising, or  
 11 otherwise affecting the scope or maintenance of patent claims.<sup>12</sup> To avoid any doubt,  
 12 “prosecution” as used in this paragraph does not include representing a party challenging a patent  
 13 before a domestic or foreign agency (including, but not limited to, a reissue protest, *ex parte*  
 14 reexamination or *inter partes* reexamination). This Prosecution Bar shall begin when access to  
 15 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [Optional: or “HIGHLY  
 16 CONFIDENTIAL – SOURCE CODE”] information is first received by the affected individual  
 17 and shall end two (2) years after final termination of this action.<sup>13</sup>

18           9.       SOURCE CODE [Optional]

19           (a)     To the extent production of source code becomes necessary in this case, a  
 20 Producing Party may designate source code as “HIGHLY CONFIDENTIAL - SOURCE CODE”  
 21 if it comprises or includes confidential, proprietary or trade secret source code.

22 \_\_\_\_\_  
 23 <sup>11</sup> It may be appropriate under certain circumstances to require Outside and House Counsel who  
 24 receive access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information to  
 implement an “Ethical Wall.”

25 <sup>12</sup> Prosecution includes, for example, original prosecution, reissue and reexamination  
 proceedings.

26 <sup>13</sup> *Alternative:* It may be appropriate for the Prosecution Bar to apply only to individuals who  
 27 receive access to another party’s “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”  
 28 technical or source code information pursuant to this Order, such as under circumstances where  
 one or more parties is not expected to produce “HIGHLY CONFIDENTIAL – ATTORNEYS’  
 EYES ONLY” information that is technical in nature or “HIGHLY CONFIDENTIAL –  
 SOURCE CODE” information,

(b) Protected Material designated as “HIGHLY CONFIDENTIAL – SOURCE CODE” shall be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information [*Optional*: including the Prosecution Bar set forth in Paragraph 8], and may be disclosed only to the individuals to whom “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information may be disclosed, as set forth in Paragraphs 7.3 and 7.4, with the exception of Designated House Counsel.<sup>14</sup>

(c) Any source code produced in discovery shall be made available for inspection, in a format allowing it to be reasonably reviewed and searched, during normal business hours or at other mutually agreeable times, at an office of the Producing Party’s counsel or another mutually agreed upon location.<sup>15</sup> The source code shall be made available for inspection on a secured computer in a secured room without Internet access or network access to other computers, and the Receiving Party shall not copy, remove, or otherwise transfer any portion of the source code onto any recordable media or recordable device. The Producing Party may visually monitor the activities of the Receiving Party’s representatives during any source code review, but only to ensure that there is no unauthorized recording, copying, or transmission of the source code.<sup>16</sup>

(d) The Receiving Party may request paper copies of limited portions of source code that are reasonably necessary for the preparation of court filings, pleadings, expert reports, or other papers, or for deposition or trial, but shall not request paper copies for the purposes of reviewing the source code other than electronically as set forth in paragraph (c) in the first

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<sup>14</sup> It may be appropriate under certain circumstances to allow House Counsel access to derivative materials including “HIGHLY CONFIDENTIAL - SOURCE CODE” information, such as exhibits to motions or expert reports,

<sup>15</sup> *Alternative*: Any source code produced in discovery shall be made available for inspection in a format through which it could be reasonably reviewed and searched during normal business hours or other mutually agreeable times at a location that is reasonably convenient for the Receiving Party and any experts to whom the source code may be disclosed. This alternative may be appropriate if the Producing Party and/or its counsel are located in a different jurisdiction than counsel and/or experts for the Receiving Party.

<sup>16</sup> It may be appropriate under certain circumstances to require the Receiving Party to keep a paper log indicating the names of any individuals inspecting the source code and dates and times of inspection, and the names of any individuals to whom paper copies of portions of source code are provided.



1 instance. The Producing Party shall provide all such source code in paper form including bates  
 2 numbers and the label “HIGHLY CONFIDENTIAL - SOURCE CODE.” The Producing Party  
 3 may challenge the amount of source code requested in hard copy form pursuant to the dispute  
 4 resolution procedure and timeframes set forth in Paragraph 6 whereby the Producing Party is the  
 5 “Challenging Party” and the Receiving Party is the “Designating Party” for purposes of dispute  
 6 resolution.

7 (e) The Receiving Party shall maintain a record of any individual who has  
 8 inspected any portion of the source code in electronic or paper form. The Receiving Party shall  
 9 maintain all paper copies of any printed portions of the source code in a secured, locked area.  
 10 The Receiving Party shall not create any electronic or other images of the paper copies and shall  
 11 not convert any of the information contained in the paper copies into any electronic format. The  
 12 Receiving Party shall only make additional paper copies if such additional copies are (1)  
 13 necessary to prepare court filings, pleadings, or other papers (including a testifying expert’s  
 14 expert report), (2) necessary for deposition, or (3) otherwise necessary for the preparation of its  
 15 case. Any paper copies used during a deposition shall be retrieved by the Producing Party at the  
 16 end of each day and must not be given to or left with a court reporter or any other individual.<sup>17</sup>

17 10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN  
 18 OTHER LITIGATION

19 If a Party is served with a subpoena or a court order issued in other litigation that  
 20 compels disclosure of any information or items designated in this action as “CONFIDENTIAL”  
 21 or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” [*Optional:* or “HIGHLY  
 22 CONFIDENTIAL – SOURCE CODE”] that Party must:

23 (a) promptly notify in writing the Designating Party. Such notification shall  
 24 include a copy of the subpoena or court order;

25 (b) promptly notify in writing the party who caused the subpoena or order to issue

26  
 27 <sup>17</sup> The nature of the source code at issue in a particular case may warrant additional protections or  
 28 restrictions. For example, it may be appropriate under certain circumstances to require the  
 Receiving Party to provide notice to the Producing Party before including “HIGHLY  
 CONFIDENTIAL – SOURCE CODE” information in a court filing, pleading, or expert report.



1 in the other litigation that some or all of the material covered by the subpoena or order is subject  
 2 to this Protective Order. Such notification shall include a copy of this Stipulated Protective  
 3 Order; and

4 (c) cooperate with respect to all reasonable procedures sought to be pursued by  
 5 the Designating Party whose Protected Material may be affected.<sup>18</sup>

6 If the Designating Party timely seeks a protective order, the Party served with the  
 7 subpoena or court order shall not produce any information designated in this action as  
 8 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”  
 9 [*Optional*: or “HIGHLY CONFIDENTIAL – SOURCE CODE”] before a determination by the  
 10 court from which the subpoena or order issued, unless the Party has obtained the Designating  
 11 Party’s permission. The Designating Party shall bear the burden and expense of seeking  
 12 protection in that court of its confidential material – and nothing in these provisions should be  
 13 construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful  
 14 directive from another court.

15 11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE  
 16 PRODUCED IN THIS LITIGATION

17 (a) The terms of this Order are applicable to information produced by a Non-  
 18 Party in this action and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –  
 19 ATTORNEYS’ EYES ONLY” [*Optional*: or “HIGHLY CONFIDENTIAL – SOURCE  
 20 CODE”]. Such information produced by Non-Parties in connection with this litigation is  
 21 protected by the remedies and relief provided by this Order. Nothing in these provisions should  
 22 be construed as prohibiting a Non-Party from seeking additional protections.

23 (b) In the event that a Party is required, by a valid discovery request, to  
 24 produce a Non-Party’s confidential information in its possession, and the Party is subject to an  
 25 agreement with the Non-Party not to produce the Non-Party’s confidential information, then the  
 26 Party shall:

27 <sup>18</sup> The purpose of imposing these duties is to alert the interested parties to the existence of this  
 28 Protective Order and to afford the Designating Party in this case an opportunity to try to protect  
 its confidentiality interests in the court from which the subpoena or order issued.

1. promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;

2. promptly provide the Non-Party with a copy of the Stipulated Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and

3. make the information requested available for inspection by the Non-Party.

(c) If the Non-Party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court.<sup>19</sup> Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

#### 12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

#### 13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain

<sup>19</sup> The purpose of this provision is to alert the interested parties to the existence of confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality interests in this court.

inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B).<sup>20</sup> This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection, the parties may incorporate their agreement in the stipulated protective order submitted to the court.

#### 14. MISCELLANEOUS

14.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the court in the future.

14.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

[14.3 *Optional:* Export Control. Disclosure of Protected Material shall be subject to all applicable laws and regulations relating to the export of technical data contained in such Protected Material, including the release of such technical data to foreign persons or nationals in the United States or elsewhere. The Producing Party shall be responsible for identifying any such controlled technical data, and the Receiving Party shall take measures necessary to ensure

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<sup>20</sup> *Alternative:* The parties may agree that the recipient of an inadvertent production may not “sequester” or in any way use the document(s) pending resolution of a challenge to the claim of privilege or other protection to the extent it would be otherwise allowed by Federal Rule of Civil Procedure 26(b)(5)(B) as amended in 2006. This could include a restriction against “presenting” the document(s) to the court to challenge the privilege claim as may otherwise be allowed under Rule 26(b)(5)(B) subject to ethical obligations.

An alternate provision could state: “If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return or destroy the specified information and any copies it has and may not sequester, use or disclose the information until the claim is resolved. This includes a restriction against presenting the information to the court for a determination of the claim.”

1 compliance.]

2           14.4 Filing Protected Material. Without written permission from the  
3 Designating Party or a court order secured after appropriate notice to all interested persons, a  
4 Party may not file in the public record in this action any Protected Material. A Party that seeks to  
5 file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected  
6 Material may only be filed under seal pursuant to a court order authorizing the sealing of the  
7 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue  
8 only upon a request establishing that the Protected Material at issue is privileged, protectable as a  
9 trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to  
10 file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court, then  
11 the Receiving Party may file the Protected Material in the public record pursuant to Civil Local  
12 Rule 79-5(e) unless otherwise instructed by the court.

13           15. FINAL DISPOSITION

14           Within 60 days after the final disposition of this action, as defined in paragraph 4,  
15 each Receiving Party must return all Protected Material to the Producing Party or destroy such  
16 material. As used in this subdivision, "all Protected Material" includes all copies, abstracts,  
17 compilations, summaries, and any other format reproducing or capturing any of the Protected  
18 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must  
19 submit a written certification to the Producing Party (and, if not the same person or entity, to the  
20 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all  
21 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has  
22 not retained any copies, abstracts, compilations, summaries or any other format reproducing or  
23 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to  
24 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,  
25 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work  
26 product, and consultant and expert work product, even if such materials contain Protected  
27 Material. Any such archival copies that contain or constitute Protected Material remain subject to  
28 this Protective Order as set forth in Section 4 (DURATION).

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IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

DATED: \_\_\_\_\_  
Attorneys for Plaintiff

DATED: \_\_\_\_\_  
Attorneys for Defendant

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: \_\_\_\_\_  
[Name of Judge]  
United States District/Magistrate Judge

EXHIBIT AACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, \_\_\_\_\_ [print or type full name], of  
 \_\_\_\_\_ [print or type full address], declare under penalty of perjury that I have read  
 in its entirety and understand the Stipulated Protective Order that was issued by the United States  
 District Court for the Northern District of California on [date] in the case of \_\_\_\_\_ **[insert  
 formal name of the case and the number and initials assigned to it by the court]**. I agree to  
 comply with and to be bound by all the terms of this Stipulated Protective Order and I understand  
 and acknowledge that failure to so comply could expose me to sanctions and punishment in the  
 nature of contempt. I solemnly promise that I will not disclose in any manner any information or  
 item that is subject to this Stipulated Protective Order to any person or entity except in strict  
 compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for  
 the Northern District of California for the purpose of enforcing the terms of this Stipulated  
 Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint \_\_\_\_\_ [print or type full name] of  
 \_\_\_\_\_ [print or type full address and telephone  
 number] as my California agent for service of process in connection with this action or any  
 proceedings related to enforcement of this Stipulated Protective Order.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_  
 [printed name]

Signature: \_\_\_\_\_  
 [signature]